BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MADELINE R. KERN	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,140
AMERITRUCK REFRIGERATED TRANSPORT, INC.	)	
Respondent	)	
AND	)	
	)	
CLARENDON NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the June 11, 1999 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This is a claim for repetitive mini-traumas alleged to have occurred each and every working day through February 24, 1999. Judge Frobish found the claim compensable and granted claimant's request for medical benefits. At the June 2, 1999 preliminary hearing respondent first defended the claim on the basis that the Kansas Workers Compensation Act did not apply because claimant was an independent contractor and fell within the provisions of K.S.A. 44-503(g). During the preliminary hearing respondent added an argument that the Kansas Act does not apply because claimant was not injured in Kansas and the contract of hire was not made in Kansas. Whether claimant's injuries were caused by her employment was also made an issue at the preliminary hearing. On appeal to the Board respondent attempts to add a defense that "Claimant did not provide written notice within 200 days of the alleged accident to Respondent." That issue was not raised at preliminary hearing and was not addressed by the ALJ. It would be unfair for the Board to consider that issue when claimant was not informed at the preliminary hearing that timely written claim was disputed at a time when claimant could have provided evidence on that issue. Therefore, the Appeals Board will not address the issue of written claim at this time. Respondent may raise that issue at a subsequent preliminary hearing or at the time of regular hearing.

Accordingly, the issues before the Appeals Board on this appeal are:

1. Is claimant an owner/operator as defined by K.S.A. 1998 Supp. 44-503 and/or K.S.A. 1998 Supp. 44-503b?

2. Was claimant injured in Kansas and, if not, was there a Kansas contract of hire?

3. Was claimant's injury caused by her employment activities with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Claimant, a resident of McPherson, Kansas, has worked as a commercial over-the-road truck driver for 20 years.

2. In 1997 she went to work for respondent, and, except for a short period from March through July 1998, claimant continued driving for AmeriTruck and its subsidiary KTL until approximately March 1999.

3. In 1997 claimant experienced a fall at work which she reported to Pat Eades, the safety supervisor for respondent. The fall that she had was in mid-July 1997 and occurred at a fuel stop in McPherson, Kansas. At first claimant thought she had a sprained wrist but then her hands and arms started causing her a great deal of pain. She got progressively worse until it went all the way up to her shoulders. Claimant is alleging repetitive use injuries to both hands, arms and shoulders from her work activities "each and every day ending February 24, 1999."

4. On March 31, 1999, apparently at the request of her attorney, claimant was examined by Pedro Murati, M.D. She described numbness in both hands over the past year with pain in her wrists, elbows and shoulders. Driving made her condition worse. Based upon his physical examination and nerve conduction test results, Dr. Murati diagnosed bilateral carpal tunnel syndrome and bilateral ulnar cubital tunnel syndrome. Due to the severity of claimant's condition, he recommended claimant be evaluated by a surgeon as claimant may not respond to conservative treatment.

5. When claimant returned to AmeriTruck in July 1998 it was as a driver of a leased truck. Claimant did not own the truck (tractor unit). She leased the tractor from another individual and in turn leased it to respondent. The trailer unit was owned by respondent.

6. Respondent was made aware that claimant did not own the vehicle, but that she was leasing it. In fact the contract with the owner of the vehicle was completed at respondent's office and respondent was given a copy of that contract.

7. Claimant was paid by the mile. Respondent deducted for insurance. Claimant was told that this included workers compensation insurance. It was not until after she filed her claim for workers compensation benefits that she was told she was covered under an occupational accident insurance policy and that there was no workers compensation insurance coverage.

8. Signs were placed on claimant's truck that read "AmeriTruck". Respondent installed a satellite communication system in the truck. Claimant was not permitted to haul for anyone other than respondent. Respondent instructed claimant what time to pick loads up, where to pick loads up, where to take the loads and when to deliver them. Claimant was required to follow respondent's safety rules.

9. Claimant drove in Kansas and in all of the 48 contiguous states.

10. When claimant returned to work as a driver for AmeriTruck in July 1998 she was told she had to carry her own workers compensation insurance but that respondent would take care of purchasing that insurance for her. Claimant was never told that respondent was purchasing occupational accident coverage. The difference between workers compensation coverage and occupational accident coverage was never explained to her or discussed. The insurance deductions from claimant's pay by respondent were described as being for several types of insurance including workers compensation. In December 1998 claimant was sent a message by respondent that said there had been an error and workers compensation had not been deducted from her October, November and December checks and therefore the deduction for that period was going to be taken out all at one time. The deduction was referred to as workers compensation and not as occupational accident coverage.

11. Claimant entered into an agreement with respondent entitled "Independent Contractor Operating Agreement." This contract was signed in Oklahoma City, Oklahoma. Before claimant went to Oklahoma City to sign the contract she had discussions with the recruiting people from respondent on the telephone. Those telephone calls were made to claimant at her home in McPherson, Kansas. Claimant testified she was offered and accepted employment over the telephone before going to Oklahoma City to sign the contract.

12. About March 1999 claimant signed a second independent contract agreement, this time with a subsidiary of respondent known as KTL, Inc. The provisions of that contract were similar to the contract with AmeriTruck and it appears for purposes of this claim that AmeriTruck and KTL are being treated as one and the same.

CONCLUSIONS OF LAW

The Administrative Law Judge found Kansas jurisdiction based on a Kansas contract of hire.[1] The Appeals Board finds that claimant's injuries occurred, at least in part, in Kansas. This confers Kansas jurisdiction.[2]

The Appeals Board will next decide whether claimant is an employee of respondent or an independent contractor.

> The test for determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and whether the employer has the right to direct the manner in which the work is to be performed, as well as the result which is sought to be accomplished.[3]

The parties cite K.S.A. 1998 Supp. 44-503b(h)(1) which excludes self-employed contractors from the definition of a worker.

> For purposes of this section, any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor within the meaning of this section or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of this section or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. §3101 et. seq., the federal social security act, 42 U.S.C. §301 et seq., the federal unemployment tax act, 26 U.S.C. §3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. §3401 et seq.[4]

The ALJ found this statute inapplicable because claimant was not the owner of her truck. The Appeals Board agrees.

---

[1] See, Neumer v. Yellow Freight System, Inc., 220 Kan. 607, Syl. ¶ 2, 556 P.2d 202 (1976).

[2] K.S.A. 1998 Supp. 44-505; K.S.A. 44-506; Graff v. TWA, Kansas Supreme Court Docket No. 82,148 (1999).

[3] Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 198, 558 P.2d 146 (1976).

[4] See also, K.S.A. 1998 Supp. 44-503.

The Kansas Supreme Court has considered instances where a claimant was a truck driver or owner-operator of a truck, contracting with companies whose business was to deliver goods throughout the United States. The Court has held the employer's right to control is an important element in determining what makes an employee or an independent contractor.[5] However, there are many other elements which must be considered. K.S.A. 1998 Supp. 44-501(g) states in part:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both.

The Appeals Board acknowledges conflicting evidence in this case could lead to a different result. However, based upon the legislative mandate of K.S.A. 44-501(g) and the facts found herein, the Appeals Board finds that claimant was an employee of respondent on the date of accident. The amount of control exercised by respondent and the level of supervision by respondent over the work of the claimant satisfies the right of control test set forth in Anderson, *supra*.

Did claimant's accidental injury arise out of and in the course of her employment? Respondent provides no evidence to contradict claimant's description of the accidental injury. The Appeals Board, therefore, finds claimant has proven that the accidental injury arose out of and in the course of her employment with respondent.

WHEREFORE, the Appeals Board affirms the June 11, 1999 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Brian J. Fowler, Kansas City, MO
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

[5] See e.g. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 198, 558 P.2d 146(1976); Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).